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A WORD FROM THE PRESIDENT

Now that the war is over and the young men are returning to the practice, I hope that there will be a large increase in the number of the younger members of Junior Barrister age and that there will be a large increase in interest in the Junior Bar Activities. I urge that the older lawyers encourage their young associates and employees to participate actively in the program of the Junior Barristers and allow them time to do so.

The Junior Barristers of the Los Angeles Bar Association consists of the male members of the Association who have been admitted to practice by examination within seven years. Juniors have a reduced rate of dues during the first five years after admission to practice. The Board of Trustees is now considering a proposal to eliminate the period of service in the Armed Forces in calculating the five and seven years periods.

The Juniors enjoy semi-self-government and have their own program as well as participate in the work of the Association. This year, there is a junior member on each of the committees of the Association except two. Several committees with active

programs of investigating procedures and practice will have working representatives of at least five Juniors for each Committee.

A participation in the Junior Barrister's Activities stimulates and broadens the young lawyers' acquaintanceship among themselves and among the older lawyers and the judges. It gets the young lawyers started in Bar Association and State Bar work. I am sure that early activity in organized bar work pays high dividends in enjoyment of the practice of law both at once and in later years.

Alex W. Davis

A CALL FOR VOLUNTEERS

Chairman J. F. Simpson of the Federal Court Criminal Defense Committee is making a request for volunteers to serve as members of a panel to represent indigent defendants in the Federal Court. The attorneys who volunteer should be available for service for the period June 1, 1946, to March 31, 1947.

Attorneys volunteering to serve will appear on one Monday during this period of time, and will be appointed to represent such indigents as may be arraigned without counsel on that date. They will advise the defendants of their constitutional rights, ascertain whether they are in fact indigent, represent them upon the entry of a plea of guilty or *nolo contendere*, if such be entered, and also at the imposition of sentence upon such plea. Should the defendants plead not guilty and the cases be tried they will represent them at the trial and also appear at the time of sentence should they be found guilty.

If an attorney should be appointed in more than one case requiring trial, and should he not wish to be burdened with trying more than one case, the committee will endeavor to provide counsel for assignment in such excess cases.

Service on this committee will appeal to young attorneys and returning service men who would like to obtain experience in criminal matters in the federal courts.

The younger members who have served on the panel found the experience to be invaluable, and highly recommend it to other members of the Bar who have not had the benefit of such an assignment. —F. S. B.

GROUP INSURANCE PLAN

By Paul Nourse

Chairman Insurance Committee, Los Angeles Bar Association

IT IS believed that by the time this issue of the BULLETIN reaches the members, the group insurance plan will have become effective.

In anticipation of this, your Insurance Commitee has secured the agreement of the National Casualty Company to permit members who did not sign up during the enrollment period and who are qualified by age for insurance, to file their applications at any time before June 20th. If they do this, their applications will be accepted without proof of insurability. *June 20th, however, is the final deadline,* and thereafter no present member of the Association may take advantage of this group insurance without submitting satisfactory proof of insurability.

The National Casualty Company's local office advises us that it will take some time to issue the certificates of insurance under the master policy to the members, but that in the meantime they will be held covered, and immediately upon the master policy becoming effective, each person who has made application and paid his semi-annual premium will be notified by post card that his insurance is in effect.

A NEW LIGHT ON TRUST ADMINISTRATION AND TAXATION

By William J. Palmer, Judge of the Superior Court*

WALTER L. NOSSAMAN, of the Los Angeles Bar, is the author of a two volume work titled "Trust Administration and Taxation," recently published by Banks & Company and Matthew Bender & Company, of Albany, New York.

For eighteen years the author, as a practicing lawyer, has specialized in the field of law denoted by his title. With reso-

*Added note by the editors: Walter Nossaman's book is, in our opinion, one of the best in its field, and in some respects it is the best. We believe that the existence of such a work should be called to the attention of attorneys. That is why we sought and obtained Mr. Nossaman's permission to review his book, and that is why we invited Judge Palmer to write the review.—E.W.T.

lution encouraged by associates and friends familiar with his methods and achievements, he has labored fastidiously to make available to his fellows of the profession the accumulation of material and the harvest of concentrated thought garnered in his years of practical specialization. This is conservation in one of its best forms. It is another expression of that ethical principle in which professional men are schooled, and by which they believe that to share knowledge, although one may not be able to share his skill in using it, is to obey the command of the group conscience. The thought cannot be better expressed than it was by the physician Luke:

> "No man, when he hath lighted a candle, putteth it in a secret place, neither under a bushel, but on a candlestick, that they which come in may see the light."

A DISTINGUISHED COMPANY OF BOOKS

Nossaman's book joins a distinguished company, indeed a company of such excellence that one would be audacious to introduce into it another book if he were not thoroughly qualified to write it and if his own prestige were not such as to command respect for his product. In making such comment, I have in mind certain texts on the subject of trusts which are of comparatively recent publication. Professor George Gleason Bogert's seven-volume work, *The Law of Trusts and Trustees,* was published in 1935 and is kept up-to-date by pocket parts. It has four volumes of text, two of forms, and one of index and table of cases. The author is professor of law at the University of Chicago, was one of the advisers on trusts to the American Law Institute, and in other particulars has a distinguished record in the specialized field.

The Law of Trusts by Austin Wakeman Scott, Dane Professor of Law in Harvard University, was published in 1939. This is a work of four large and compactly typed volumes, three of text and one of index and table of cases. Professor Scott was the reporter on trusts for the American Law Institute. He and his work are universally esteemed in the profession.

The *Restatement of the Law of Trusts,* a two-volume book, was published in 1935. In California libraries it carries a 1940 pocket part consisting of California annotations prepared by a

committee of lawyers of this state headed by William H. Bryan of the San Francisco bar, lecturer on trusts at Hastings College of Law.

Loring's *A Trustee's Handbook* is still a well-known and widely used work of one small volume, having been revised and enlarged into a fifth edition by Mayo Adams Shattuck of the Boston Bar, published in 1940. The original of the handbook, published in 1898, was written by a practicing lawyer and trustee of Boston, long a person of eminence in his field, Augustus Peabody Loring.

Into this company Nossaman's book enters as a peer and with distinctive value, capacity to perform a service, style and "personality," if I may ascribe personality to a book. Certainly a book reflects personality. Nossaman's book is not an imitation or a condensation of any of the others. Of course, any two dependable books on the same or kindred legal subjects must contain much material that is the same, but even within the restrictions thus imposed upon individuality significant variations are possible.

AN AUTHOR IS PREPARED FOR HIS WORK

Before noting the distinctive features of Nossaman's work, let us know more about the author. He was graduated from Harvard Law School in 1912, and thereupon was admitted to the bar of New York. Later he became a member of the bar of the State of Washington and in 1928 was admitted to practice in California. For sixteen years his legal career was broadly and firmly grounded in general practice. For the next fourteen years he was trust counsel of Security-First National Bank of Los Angeles and its predecessor, Security Trust & Savings Bank. In 1942 he resigned from that position to enter into partnership with Joseph D. Brady, celebrated in the law of taxation, and in that association his practice has been specialized in the field of trusts, taxation and related matters. Since 1943 he has been chairman of the Committee on State and Federal Taxation, Real Property, Probate and Trust Law Section of the American Bar Association. He has lectured many times on subjects cognate to trusts and taxation under the respective auspices of the State Bar of California and the Los Angeles Bar Association. He is a

skillful and experienced writer. He is the contributing editor for California of "Trusts and Estates," a nationally circulated magazine published in New York. Several articles by him have appeared in the California Law Review and the Harvard Law Review.

No great book has been written in a hurry. The writing of Nossaman's book was spread over eight years. That in itself was an achievement for a busy practicing lawyer. Catherine Drinker Bowen spent four years writing the story of Justice Holmes and his family, *Yankee from Olympus,* not a large work comparatively, and although an authentic one, not one that requires the absolute fidelity to authority and precedent and the precise and comprehensive annotations of a law text.

THE "CROSS-FERTILIZATION OF THEORY AND EXPERIENCE"

The title of Nossaman's work indicates its first distinctive feature, its concentration on the practical problems incident to the administration of trust estates expressly created. Of course, just as a competent trustee or his counsel must be versed in the basic and abstract principles of the law of trusts, so this work enunciates those principles. But throughout the book the practical approach is conspicuous. The style is none the less scholarly, although it is concise and direct. The author either has a clear and immediate answer to a question in point or he tells us succinctly why the answer is in doubt.

After devoting his first chapter to elementary definitions, principles and distinctions, the author launches his treatise into a subject that probably comes first to the mind of every trust counsel when examining a document which names his client for a trusteeship and outlines the duties thereof, namely, the question of the validity of the trust and a consideration of the many matters affecting that question. While and after determining the validity of a trust, the trustee must concern himself with the interpretation and construction of the trust instruments, and Nossaman, too, proceeds immediately to that subject. A problem that usually forces itself upon the trustee, sometimes at the very beginning of trust administration, is that created by the necessity of distinguishing between principal and income. Answering that question often imposes upon the trustee one of his most hazardous

and far-reaching responsibilities, and in his book, Nossaman devotes one of eight parts, a part consisting of five chapters, to that problem.

The third part of the work deals with the rights of the settlor and of the beneficiaries generally. Part IV treats of the rights and liabilities of third persons; Part V with the rights, powers, duties and liabilities of the trustee; Part VI with that very practical subject of accountings and actions; Part VII with the difficult and often subtle aspects of the law on powers of appointment. A section of forms, born of actual practice and trust administration, concludes the first volume.

UNIQUE HANDLING OF SUBJECT OF TAXATION

A convenient device, indicating thoughtful planning, is the use of a separate volume for Part VIII, the treatise on Taxation. This is not a large volume as law books come, having 264 pages, including the index; but in those pages, with the consciseness characteristic of the entire work, the subject is comprehensively treated. As the general law of trusts is reasonably well stabilized, whereas the laws and rules on taxation are forever in flux, this use of a separate volume for the subject of taxation will greatly facilitate the supplementing of the text on that subject by pocket parts and will contribute to economy in so doing. The author deals with federal estate taxes, gift taxes, income taxes, inheritance taxes, and the conflict of laws as between states in respect to taxation, all as related to the creation and administration of trusts.

Nossaman's treatment of the subject of taxation as it concerns trustors and trustees is not equalled in any of the other books on trusts, in my judgment. Indeed, the only other such work that might appear even to rival Nossaman's in that respect is Bogert's. No amount of scholarship alone can substitute for long practical experience wrestling with and advising on the many knotty questions caused by the laws, rules and regulations on taxation and the inexhaustible variety of human experience.

DETAILS THAT CONTRIBUTE TO USEFULNESS.

Inasmuch as the author's trust practice has been in California, he does not overlook an opportunity to point out a distinctive or variant rule of law prevailing in California, but his work

definitely is not merely a California book. It is designed for general use in all the states and will give practical and convenient service to trustor, trustee, beneficiaries and their counsel in every jurisdiction. The text is scrupulously authenticated, the footnotes are copious, the citations are to the decisions of many courts, indiscriminately as to jurisdictional boundaries, discriminately as to the pertinence of the decision to the point in question, the value or uniqueness of its reasoning, and its effect as precedent.

Each of the two volumes has the typical pocket inside the back cover for the insertion of supplemental publications. The typography, I would say, is perfect. The type is delightfully readable. The selection, contrast, balance and arrangement show skill and thought. The volumes are attractive for many reasons. They have the right "feel," the right "atmosphere." Their breath is the breath of a quiet, efficient, industrious, modest, scholarly and practical gentleman of the profession.

YOU'RE WRONG ABOUT PATENTS!

By C. G. Stratton, Patent Lawyer of the Los Angeles Bar

WHEN thinking of patents, the average person thinks of the patents covering rather silly or freak inventions, such as eyeglasses for near-sighted chickens, a traveling grandstand that follows the horses around a race track, an alarm clock for heavy sleepers which drops a rope to tickle the nose of the sleeper at a certain time to arouse him, and such as the bathtub with a built-in ash tray, invented and patented by a colored girl who ran a beauty shop on Central Avenue, Los Angeles.

The more important patents, however, as a general rule, are those that are very little known by the public generally. These cover important automatic machinery, important electrical and mechanical devices and new chemical combinations and processes. One patent that was certainly honored more in its breach than in its observance was the patent on the ordinary cafeteria, which patent only expired in 1933. There were 26,000 infringers upon that patent when it expired!

No reference to patents would seem complete without telling again the story of the Congressman who, in 1858, introduced a bill into Congress to abolish the Patent Office, on the ground, he said, that all important inventions that were going to be invented had been invented. We seem to have had farsighted Congressmen in Congress in those days too.

We need only to look around us to see many inventions that have been conceived since 1858, such as automobiles, aeroplanes, radios, movies, dive bombers, telephones, electric lights, and Mickey Mouse.

ABOLISH PATENT OFFICE?

In order that this pre-Civil War Congressman might not be placed in too bad a light, we should ask ourselves today, in the year of our Lord, 1946: should we abolish the Patent Office today on the ground that every important invention that is going to be invented has been invented?

Let us look into the crystal ball at what is happening eighty years from now. I see your great-grandson sitting in his living

room. Of course, he has a television set, but it not only transmits sound and pictures, but also color.

This great-grandson's living room is not only air conditioned to regulate heat and cold, but its air conditioning device has a gadget by which he can introduce more oxygen into the air. He has been analyzed by his physician who has told him the optimum amount of oxygen that should be in the air for his particular well-being.

John D. Rockefeller prolonged his life by getting under an oxygen tent several times a week, and experiments have shown that drunks can be sobered up more quickly in an atmosphere super-charged with oxygen. Therefore, this great-grandson of yours has this principle applied to his air conditioning unit.

There is a noise filter on the great-grandson's home, which keeps out noises. He has a wireless pocket telephone, but even more than that, it is a visual telephone, so that he can see the person with whom he is talking.

The roof of this great-grandson's home is round, or dome-shaped. This is his air field. His helicopter rises from it vertically.

MECHANICAL STENOGRAPHER

At this great-grandson's office, he has a mechanical stenographer. He merely dictates his letters into a machine and they come out all typewritten. This is not so awfully outlandish, for the "Scientific American" is the authority that such a machine was more or less satisfactorily made in 1896 and another one in 1916. Naturally, in the years to come there will be resistance against this invention because it takes the glamor out of business!

Moreover, this great-grandson does not eat food such as we know it. When his physician analyzed him, he had certain amounts of proteins, carbohydrates, etc., prescribed for him. Therefore, this great-grandson eats pill No. 12 for breakfast, pill No. 52 for luncheon, and pill No. 148 for supper.

Another radical change is that this great-grandson does not need sleep. We are told that when we become tired, glycogen in our blood turns to lactic acid, and when we rest this lactic acid turns back to glycogen. This great-grandson does not rest to make this change. He merely takes a pill or an intra-venous

injection, whereby the lactic acid of his blood is chemically turned back to glycogen. Of course, since the great-grandson does not sleep or rest, beds have been eliminated!

This is admittedly just a pipe dream. The future may, and probably will not be anything at all like this, but it is stated with positive assurance that the future will be as different from today as today is from 1858; in fact, future inventions should come more rapidly than they have in the past, because every time a new field of invention is opened up, hundreds or thousands of new inventions are made in that field. It took far longer to invent the common screw, in the history of mankind, than it has taken since to invent the most complicated automatic machine that we have today.

The patent Office is bursting with new ideas that have not yet been adopted. Patents are being granted at the rate of approximately 30,000 a year, or about 500 to 600 new patents every week.

PATENT MEDICINES UNPATENTED

A common error in patent law is the thought that so-called patent medicines are patented. In most instances, this is untrue. The names of most patent medicines are registered in the United States Patent Office as trade-marks, such as "Tanlac," "Lydia E. Pinkham's Vegetable Compound," etc. This is probably where the word "patent" arose in connection with most proprietary medicines.

The personal friends of a Patent Attorney are convinced that he is bound to get rich; that all he has to do is sit behind his desk and wait for a revolutionary invention to be presented to him by a poor but clever inventor who is badly in need of funds; that upon buying an interest in such an invention, it is only a question of time before said Patent Attorney will retire wealthy.

It may be a striking condemnation of human foresight, but a patent attorney can no more predict with certainty which inventions of today will be commercial successes ten years from today, than a real estate man can positively predict which way, or how much, the city is going to grow in ten years. This is because a patent attorney cannot tell which direction civilization is going to take in the future.

Another popular error in patent law is that an idea (of a desirable result) is patentable. Such an idea is not patentable, but the means by which the idea is carried into effect may be patentable. For instance, as a demonstration, take an empty tin can from which your wife has served you some food. You had better do this after dinner. Wash the can and dry it. Then turn the can with the open end down upon a white sheet of paper. Then open the upper, closed end of the can with your wife's can opener.

EVERYBODY EATS METAL

Then lift the can from the white sheet of paper, and you will see a ring of dark metal filings that you have cut from the can and dropped on the white sheet of paper under the can. If it happenus to be a cheap can opener that your wife bought from a five-and-ten-cent-store before the War, the results will be all the "better." The cheaper the can opener the poorer its metal. The poorer its metal, the duller it has gotten with use. The duller it is, the larger these metal filings will be.

In other words, this is what one eats when one opens a tin can with a dull can opener, and there must be millions of awfully dull ones throughout these United States.

Now it would be a good idea if some one would invent a can opener that would catch these metal particles. That's a good idea, but it is only an idea of a desirable result and is not patentable. Then an inventor comes along with the idea of having a can opener with a magnetized blade that will magnetically retain these filing on the blade while opening a can, and prevent them from falling into the food in the can. That would be a patentable invention, if it were only new, but it's already patented.

Think what a good advertising man could do with that invention! He could make the public afraid to eat from cans, unless they used his magnetic can opener. That invention ought to be worth a lot to the can companies—to suppress.

To save this wrath of the can companies from your petitioner's head, let it be quickly said that the American people appear to be thriving quite well upon its diet of metal filings. That must be the "iron" we hear so much about in spinach.

GOOD ATTORNEY—GOOD PATENT

Perhaps unfortunately a patent is no better than the attorney who gets it. On first blush, it would seem much fairer if an inventor of a good idea were awarded a good patent and an inventor of a mediocre idea were only given a patent of corresponding value.

But, "the value of patents depends largely upon the skillful preparation of the specification and claims." These words are from the Official Rules of Practice of the United States Patent Office.

Thus, if it were possible (which it is not) for ten different patent attorneys to get ten patents on exactly the same invention, these patents would be good or bad (broad or narrow) in proportion to the skill, care and perseverance of the respective attorneys. A rule of thumb would appear to be that a good patent attorney gets a good patent and a poor attorney gets a poor patent.

Well, doesn't a good trial attorney win cases, and a poor trial attorney lose them?

TAXATION OF COMMUNITY INCOME AND PROPERTY

By E. H. Conley, of the Los Angeles Bar

MANY of us have heard the layman's definition of the law as "a race between the lawyers and the legislators with the lawyers always just one jump ahead."

Whether or not we agree with this definition as a matter of principle, at least we must admit that it describes accurately the history of Community Property in California from a tax standpoint. Unfortunately, since the decision of the United States Supreme Court last December 10th in the case of *Fernandez v. Wiener,* 325 U. S. ...., 90 L. Ed. Adv. Ops. 147, upholding the 1942 amendments to Section 811(e), I. R. C., it seems that the legislators have finally overtaken the lawyers. Now it is the lawyers' turn to devise counter measures—if possible.

Before considering tax problems, we must first answer the preliminary question: What is community property? Civil Code Sections 162 and 163 define the separate property of the husband and wife as all property of the husband or wife owned by either before marriage and that acquired afterwards by gift, bequest, devise, or descent with the rents, issues, and profits thereof. Having first defined separate property, the Civil Code (Sec. 164) then provides that—

> "all other property acquired after marriage by either husband or wife or both, including real property situated in this state heretofore or hereafter acquired while domiciled elsewhere which would not have been the separate property of either if acquired while domiciled in this state, is community property."

This is the legal definition of community property. From a practical standpoint, community property has come to mean a system existing in the western and southern portions of the United States which permits husbands and wives to divide their income and thereby save income taxes. The tax advantages of this system have become so important in recent years that the original purpose, namely: "to guarantee to the wife her fair share of the marital gains"—has been almost forgotten.

In order to consider intelligently the tax phases of community property, it is first necessary to consider the legal incidents of the system. Under the original Spanish-Mexican law, the husband had the irrevocable dominion and control over the community property. He could sell and dispose of it at will, subject only to the limitation that he could not use his dominion in such a way as to defraud his wife. (*Panaud v. Jones,* 1 Cal. 488.) When the husband died, however, the wife's defeasible interest became indefeasible, and she succeeded to absolute ownership of her one-half of the community estate.

After California came under the American flag, the Supreme Court of California decided in *Panaud v. Jones, supra,* that the wife's interest during her husband's lifetime was not a true property interest. In 1916 the Supreme Court, in the case of *Spreckels v. Spreckels,* 172 Cal. 775, 158 Pac. 537, again affirmed this earlier decision, so that until the Code amendments of July 29, 1927, her interest remained only an expectancy. (*Boyd v. Oser,* 23 Cal. (2d) 613, 145 Pac. (2d) 312).

Starting with an expectancy under the Spanish-Mexican Law, the wife's interest in community property increased gradually through the years. When the Civil Code was adopted in 1872, she received for the first time the right to contract freely with her husband and with third parties in regard to property. (Cal. Civ. Code 1872, Secs. 158, 159). In 1889, an amendment was passed creating the presumption that where property was conveyed to a married woman by a written instrument, it became her separate property. (Civil Code, 164). Another amendment adopted in 1891 required the wife's written consent to all gifts or voluntary transfers of community property. (Civil Code, 172),—the first important limitation upon the husband's control over such property.

Nothing further of importance happened until 1917, when the Civil Code was amended again to give the wife two more incidents of ownership. For the first time she could secure a vested interest in a part or all of the community property during her lifetime without divorcing her husband. Civil Code, Sec. 137, as amended, permitted the court in a separate maintenance suit to award her all of the community property under certain circumstances. Again, Sec. 172a was passed requiring the wife's signature to any instrument whereby community real property was sold, conveyed, encumbered, or leased for a period longer than one year. At the same time, the Inheritance Tax Act was amended to permit the wife to receive tax-free her one-half of the community property.

Again in 1923, the Legislature enlarged the wife's powers. Sections 1401 and 1402 of the Civil Code (now Probate Code Sec. 201, 202) were amended to give the wife the right to dispose of her half of the community property by will and to give her all of the community property upon her husband's death intestate.

Finally, in 1927, the Legislature gave the wife for the first time a "present, existing, and equal" interest in the community property by adding Sec. 162a to the Civil Code—but retained management and control in the husband as provided in Sections 172 and 172a. Thus, we have reviewed briefly the evolution of the wife's interest in community property from Spanish-Mexican

days until the present time, for the changes since 1927 have been unimportant.

Now let us consider in like chronological order the various steps in the development of the Federal Income Tax and Estate Tax treatment of community property. The first important income tax case was *United States v. Robbins,* 269 U. S. 315, 70 L. Ed. 285, 46 S. Ct. 148 (1926), which held that the husband was taxable upon all community income as the law then (1918) stood, since the wife had only an *expectancy* (citing *Roberts v. Wehmeyer,* 191 Cal. 611, 218 Pac. 22), and therefore the husband *owned* all of it. Furthermore, the opinion written by Mr. Justice Holmes contained dictum to the effect that the husband's *control* over the community property was sufficient to justify taxation even in the absence of complete ownership.

Four years later (1930) in *Poe v. Seaborn,* 282 U. S. 101, 75 L. Ed. 916, 50 S. Ct. 336, in a case arising from the State of Washington where the wife had a vested interest, the Supreme Court rejected the control test and adopted the *property test,* permitting the husband and wife to divide the community income. This rests on the theory that since the Income Tax Act imposes a tax on the net income "of every individual," the significant factor is *ownership,* and that the incidents of tax follow the ownership of income. Inasmuch as the Income Tax Act, even today, does not refer to community income as such, the significance of the ownership theory as opposed to the control theory becomes apparent. Since Mr. Justice Holmes, who wrote the opinion in the *Malcolm* case, did not dissent, we may assume that he accepted the ownership test and joined in rejecting the Commissioner's argument that "control is indistinguishable from ownership." The Court held that the husband exercised this control "not because he was the exclusive owner, but because by law he was created the agent of the community."

Following the adoption of the 1923 amendments to the Civil Code, a second attempt was made to file so-called "split returns" in California, but the Circuit Court of Appeals for the Ninth Circuit held that these amendments affected her rights *after* death rather than during her life, and that therefore the husband still owned all the income. (*Hirsch v. United States,* 62 F. (2d)

128, Cert. Den. 289 U. S. 735, 77 L. Ed. 1483, 53 S. Ct. 595 (1933).)

Then came the amendments of July 29, 1927, giving the wife a "present, existing, and equal" interest. Again the Treasury Department resisted all attempts to divide the community income, but the United States Supreme Court, in *United States v. Malcolm,* 282 U. S. 792, 75 L. Ed. 714, 51 S. Ct. 184 (1931) decided that California wives had finally acquired a present vested interest in community property, and that as to all income earned after July 29, 1927, each member of the community should be taxed on one-half. The *Malcolm* case, a *Per Curiam* decision, without dissent, has never been overruled, so there has been no change in the tax status of community income down to date.

The record of the Federal Estate Tax treatment of community property followed the Income Tax pattern very closely until the 1942 amendment to the Internal Revenue Code except for the fact that the early case of *Wardell v. Blum,* 276 Fed. 226 (1921), affirming 270 Fed. 309, certiorari denied 258 U. S. 617, erroneously held that the wife's interest in community property under the California law as it stood in 1918 was vested. Nevertheless, the Treasury Department continued to tax all of the property in the husband's estate upon the husband's death. Following the 1923 amendments, two decisions of the Attorney General issued in 1924 held only one-half of the community property taxable, and refunds of taxes previously paid were begun. Then came the decision of the Supreme Court in *United States v. Robbins, supra,* holding correctly in an income tax case that the wife's interest was only an expectancy, whereupon the Attorney General quickly reversed his position and ruled that all community property should be included in the husband's estate at his death. This continued to be the practice until the adoption of the July 29, 1927, amendments.[1]

Following the 1927 amendments and the *Malcolm* case, *supra,* recognizing that the wife finally had acquired a present vested interest in community property for income tax purposes, the

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[1]Talcott v. U. S., 23 F. (2d) 897, cert. denied, 277 U. S. 604; Title Insurance & Trust Co. v. Goodcell (Ninth Cir.), 60 F. (2d) 803, cert. denied, 288 U. S. 613; Gump v. Commissioner, 124 F. (2d) 540, cert. denied, 288 U. S. 613.

Treasury Department reversed its earlier Regulation, and from 1927 until 1942 recognized the widow's one-half of the community property acquired after July 29, 1927, was not taxable for Estate Tax purposes on the death of the husband.[2]

From time to time during the fifteen year period from 1927 to 1942, the Treasury Department attempted to induce Congress to pass legislation denying to residents of community property states the advantages of dividing income between the spouses and of paying Estate Tax only upon the husband's one-half of the community property at his death. Both the Income Tax and the Estate Tax amendments were defeated in Congress each time they were offered, up to and including 1941.

In 1942 the Treasury Department was finally successful in the cases of Estate and Gift taxes. The Revenue Act of 1942 contained Section 402(b)(2) amending Section 811(e) of the Internal Revenue Code requiring the inclusion in the gross estate of decedent the following property:

> "(2) Community Interests.—To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest include in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition."

The result of this language is particularly unfair to residents of community property states in that (1) upon the husband's death, *all* of the community property is taxed (unless the wife actually earned a portion by her personal efforts), while (2) upon the wife's death, at least *one-half* is taxable because of her power of testamentary disposition, and the husband has the burden of proof to show that he actually earned the other one-half. Such proof is often difficult to produce, for usually no books are kept.

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[2]United States v. Goodyear, 99 Fed. (2d) 523; Overton v. Sampson, 138 Fed. (2d) 417; H. M. Bigelow Est., 39 B.T.A. 635 (1939), Commissioner acquiesced.

If there has been commingling of separate and community property, the husband may fail completely to sustain the burden of proof.

This amendment to the Internal Revenue Code was attacked immediately upon constitutional grounds in cases arising in Louisiana and Texas. The Federal District Courts in both cases held the amendment unconstitutional. Appeals were taken directly to the United States Supreme Court. On December 10, 1945, in the cases of *Fernandez v. Wiener* and *United States v. Rompel,* the court by unanimous decision (Mr. Justice Jackson being absent in Europe) upheld the constitutionality of the Statute.

To illustrate the importance of this decision in the eyes of the tax-paying public, note the Dow Jones comment announcing the decisions:

> "California, the country's wealthiest community property state, finds that such a status can have its drawbacks.
>
> "In community property states, most of which are in the West, husband and wife share equally in property and income. The U. S. Supreme Court, however, recently held that the Internal Revenue Bureau has the right to assess estate taxes against the combined estate in the event of the husband's death.
>
> "Until this blow fell, the surviving member of a California couple, as in any state with similar laws, could claim half the estate when the other died, leaving only half subject to taxation.
>
> "Not only will all community property be subject to estate taxes when the husband dies, but the court's ruling carried the implication that the estate might be taxable if the wife dies first. In non-community property states there are no taxes to pay until the husband dies unless the property is in the wife's name."

First let us consider the reasoning of the court in the *Fernandez* case, and then the implications. Decedent died a resident of Louisiana and the Commissioner included all of the community property in his gross estate pursuant to the provisions of Section 402 of the Revenue Act of 1942. The taxpayers paid the deficiency and, following rejection of their claim for refund, brought suit in the District Court to recover the amount of the deficiency payment. Taxpayers were successful in the District

Court, which held the section to be unconstitutional, and an appeal was taken by the Commissioner direct to the Supreme Court.

The Supreme Court, without dissent, held the statute to be constitutional, Mr. Chief Justice Stone delivering the opinion of the court and Mr. Justice Douglas writing a concurring opinion in which Mr. Justice Black concurred. The court, after reviewing the nature of the respective spouse's community property interest as defined by Louisiana law, pointed out that "so long as the community continues the wife has no control over community property," and that "upon the termination of the community share, her heirs, or other designees, receive in full possession and enjoyment one-half in value of the total community assets . . ." Reference was then made to the report of the House Committee recommending the adoption of the amendment to Section 811 of the Internal Revenue Code, pointing out that it was designed to prevent preferential treatment to citizens of community property states. Finding no dispute existed as to the construction or operation of the statute, it then affirmed that the power of Congress to impose death duties "extends to the creation, exercise, acquisition, or relinquishment of any power or legal privilege which is incident to the ownership of property." After pointing out that the court has consistently sustained the application of estate taxes upon the death of one of the joint owners of property and when applied to tenancies by the entirety, and stating that "the emphasis in these cases was on the practical effect of death in bringing about a shift in economic interest" the court decided that the death of the husband of the Louisiana marital community "not only operates to transfer rights in his share of the community to his heirs or those taking under his will," but also "terminates his expansive and sometimes profitable control over the wife's share and for the first time brings her one-half of the property into her full and exclusive possession, control, and enjoyment."

In view of the language of the statute expressly including "community interest in the estate of decedent" and of the fact that *something happened* upon the death of the husband, it is very difficult to disagree with the court's opinion that Section

811(e) of the Internal Revenue Code as amended is constitutional.

Now a word as to the implications of this decision. We may assume at the outset that the opinion is sound. At least all eight Justices concurred, which is quite unusual for the Court as presently constituted. Furthermore, when the learned Chief Justice (who wrote the opinion) based his decision on the power of Congress to impose death taxes upon the "shifting from one to another of any power or legal privilege which is incident to the ownership of property," the result is inescapable. The fact that Civil Code Section 172a retains "management and control" in the husband indicates clearly that he relinquishes something of value when he dies. Even if the wife had stood on an equal basis with the husband in regard to control, the result would undoubtedly have been the same, since she would for the first time come into *complete* possession and enjoyment of the entire estate.

The Court cites the case of *Moffitt v. Kelly,* 210 U. S. 400, 54 L. Ed. 1986, 31 S. Ct. 79 (1910) where it sustained the constitutionality of a California inheritance tax upon all of the community property passing to the wife upon the husband's death. This was before the 1917 amendment exempting the wife's half and before the 1927 amendments giving her a vested interest in her share. The tax was sustained "not as tax upon property, but as a tax upon the vesting of the wife's right of possession and enjoyment arising upon the death of the husband."

While the *Wiener* and *Rompel* cases both dealt with taxes arising upon the death of the husband, the language is broad enough to sustain the tax upon one-half of the community property upon the death of the wife. Thus, there is no escape from a constitutional standpoint from this tax at the wife's death which does not exist in non-community states.

Fear has been expressed in some quarters, since these decisions, that the Treasury Department may attempt to tax *all* of the community property upon the death of the wife. This fear is based upon a misconception of certain language in the court's opinion indicating that *if* Congress had levied such a tax, it *would* be constitutional. But Congress has expressly excepted "such part thereof as may be shown to have been received as

compensation for personal services actually rendered by the surviving spouse" (up to one-half). This, of course, is similar to the exception in the case of joint tenancy property, so it is a well-recognized method of protecting a survivor. There is no reason to believe that the Treasury Department will attempt to secure legislation removing this exception so as to tax *all* of the community property upon the wife's death.

Now let us consider the effect of the *Wiener* and *Rompel* decisions upon income taxes in community property states. It has been suggested that the Treasury Department *may* attempt to tax to the husband all community income earned by the husband *without* further legislation. This would seem to be unwise from the standpoint of the Government.[3] The Estate Tax cases were based on an amendment dealing specifically with community property. The fact that the Supreme Court upheld such *legislation* does not mean that it would also uphold an income tax upon all of the community income against one of the spouses *in the absence of legislation.*

In order to uphold such a tax, the Court would be compelled to overrule its earlier decisions in *Poe v. Seaborn,* and *United States v. Malcolm, supra.* If anything remains of the doctrine of *implied congressional approval,* it should certainly apply in a case where the Supreme Court decided a principle of taxation sixteen years ago and Congress has since defeated attempts to amend the law so as to prohibit the division of community income between husband and wife. As a matter of fact, the Supreme Court approved this doctrine of "legislative sanction" in *Poe v. Seaborn, supra,* with regard specifically to the right to file "split returns."

Furthermore, even if a statute is adopted purporting to tax *all* of the community income to the spouse through whose personal efforts it was earned, a much sounder constitutional argument can be advanced against such legislation than against the Estate Tax amendments. As hereinabove pointed out, the shift-

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[3]On Feb. 25, 1946, hte Commissioner recognized the right of the husband and wife to file separate returns under new community property statutes in Oklahoma (I. T. 3782) and Hawaii (I. T. 3784), citing Poe v. Seaborn and Commissioner v. Harman. This would seem to indicate that the Bureau will not attempt to tax all of the community income to one spouse unless Congress amends the Code.

ing of control to the wife upon the husband's death furnished a sufficient change in status to support a death duty.

However, no such well-recognized basis for taxation exists in the case of community income. The Supreme Court rejected the control test in the case of *Poe v. Seaborn, supra,* and adopted the so-called "property" or "ownership" test. Of course, these decisions construed an Income Tax Act containing no reference to community income as such.

Perhaps a different result would be reached if Congress adopted such legislation as was proposed by the Senate Finance Committee in 1941 to the effect that:

> (a) income earned by each spouse (whether or not treated as community property under State law) shall be considered as income of the earner thereof;
>
> (b) income derived from community property shall be considered as the income of the spouse who has the management and control thereof under the local state law;
>
> (c) in case the spouse elects to file separate returns, the spouse required to treat such income as his individual income shall alone be entitled to the deductions and credits properly allocable to such income.

Even this legislation would be subject to the constitutional objection that it deprives the wife of her vested interest in her one-half of the income of the family partnership, that she contributes equally with the husband to the earning of the income through her services in the home, and that the husband cannot be taxed on income which he does not own. (See *Berkokwitz v. Com.,* 108 F. (2d) 319, C. C. A. 3d, 1939). Furthermore, the Supreme

Court rejected the so-called "control" test in *Poe v. Seaborn, supra,* on the ground that the husband exercised this control, not as an owner, but as agent for the community. It may also be recalled that the Supreme Court as recently as November 20, 1944, in the case of *Com. v. Harmon,* 323 U. S. 103, 89 L. Ed., Adv. Ops. 71, 65 S. Ct. 103, refused to approve an elective community property system in Oklahoma, but recognized that the wife had certain vested rights to income in community property states.

So far, we have heard nothing of any attempt by the Treasury Department to propose new legislation along these lines. It has been unable in the past to secure the adoption of such legislation, and it is obvious that it will meet the same determined opposition in the future that it has met in the past. Nevertheless, the prediction is ventured that a statute somewhat along the lines of the proposed 1941 amendment will be adopted ultimately by Congress. When this occurs, the Supreme Court will finally be called upon to decide whether or not any tax advantage whatsoever remains to the community property system.

What will happen then? How can a lawyer answer such a question today? It will depend entirely upon the composition of the Supreme Court at the time the case is decided. Purely as a matter of constitutional law, the Court must overrule *Poe v. Seaborn, supra,* and also *Hoeper v. Wisconsin,* 284 U. S. 206. The *Hoeper* case holds that a husband cannot be taxed consistently with the due process and equal protection clauses of the Fourteenth Amendment on the combined total of his and his wife's income as shown by separate returns where her income is her separate property. The dissenting opinion in the case definitely endorses the family income theory of taxation. Mr. Justice Douglas and Mr. Justice Black, in dissenting from the majority opinion in *Commissioner v. Harmon, supra,* stated that the court "was more concerned with the legal doctrine than it was with economic realities." They indicated very clearly that they would have dissented in the case of *Poe v. Seaborn,* if they had been members of the court at the time it was decided. Again, in *Fernandez v. Wiener,* they indicated that they would have concurred with the dissenting opinion of Mr. Justice Holmes in the

Hoeper case, *supra*. Thus we have two members of the present court who have stated that they are entirely out of sympathy with the present status of the law regarding community income.[4] There is no doubt that these two Justices would approve the constitutionality of an income tax statute specifically taxing all of the husband's personal earnings to the husband. Perhaps a ray of hope may be derived from the fact that certain other Justices of the Supreme Court seldom agree with Messrs. Douglas and Black, but this is a very weak premise upon which to base a prediction that an amendment to the Internal Revenue Code specifically taxing the personal earnings of either spouse to such spouse would be held unconstitutional. Under all the circumstances, it appears fairly certain that the present Court would uphold the constitutionality of such a statute.

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[4]On the other hand, two present Justices (Reed and Black), concurred in the opinion in Lang v. Commissioner, 304 U. S. 264, 32 L. Ed. 133, 52 S. Ct. 880 (1918). exempting from tax the widow's community interest in insurance (State of Washington).

With regard to the question of Federal Gift Tax and community property, very little need be said other than to refer to the appropriate sections of the Internal Revenue Code and the Regulations. Section 1000(d) of the Internal Revenue Code, as amended by Section 453 of the Revenue Act of 1942, effective as of January 1, 1943, provides that:

> "All gifts of property held as community property under the law of any State, Territory, or possession of the United States, or any foreign country shall be considered to be the gifts of the husband except that gifts of such property as may be shown to have been received as compensation for personal services actually rendered by the wife or derived originally from such compensation or from separate property of the wife shall be considered to be gifts of the wife."

Prior to January 1, 1943, if property transferred comprised community property, the gift was one-half from the husband and one-half from the wife. Regulations 108, Sec. 86.2, subsection (c) further provides that the new rule also applies to a division of community property between husband and wife into the separate property of each. However, where a joint tenancy was created as to community property acquired after July 29, 1927, and prior to January 1, 1943, it is believed that no tax will result where such joint tenancy property is subsequently transmuted into tenancy in common property on the theory that such transmutation is not a gift at all but is an exchange between the husband and wife where the consideration is equal and adequate. This would not be true if the presumption that interests in joint property are separate (*Siberell v. Siberell,* 214 Cal. 767) is overcome by the proof of contrary facts as in *Tomaier v. Tomaier,* 23 Cal. (2d) 754 (1944).

The Regulations also provide that no gift tax results from a transfer on or after January 1, 1943, of separate property of either spouse into community property. There is no reason to believe that the Treasury Department will change its position as to this point.

Having now concluded that the legislators have finally overtaken the lawyers in the community property "race" we come finally to the ultimate problem which we as lawyers face, namely, "What shall we do about it?"

Our first reaction is to adopt the "sailor's" remedy when something works very badly, namely: "Let's throw it overboard!" However, we probably could not abolish the community property system in California even if we so desired, for the feminine vote is too large. After all, California had community property before income or estate taxes, and the system as it now exists with the wife having a present and vested interest gives her certain property advantages which she possesses under no other system.

If it is unwise to rescind our community property laws and if we cannot repeal Section 811(e), I. R. C., then we should take advantage of it.

How can this be done? The plan is as follows:

1. Don't overlook the fact that upon the wife's death, "there shall be included in her estate the value of such part of the community property as was subject to her testamentary disposition."
2. Under Probate Code Section 201, she may dispose of her half of the community property.
3. Therefore, have the wife execute a will disposing specifically of her half of the community property. If she dies first, then one-half of the community property is taxed in her estate, and the other half in the husband's estate upon his death, thus keeping each half in the lower brackets.

The wife must, of course, name beneficiaries other than her husband to prevent her one-half of the community property from returning to his estate. If her husband needs the income, she may leave him a life estate or life income from a trust. In view of the fact that the wife's one-half of the community property will be taxed in her estate in any event upon her death, she must not be permitted to die intestate for her husband would then succeed to *all* of the community property to be taxed again in his estate if he survives her by five years.

An examination of a few computations will illustrate this point. Assume an estate of $1,000,000.

1. Case I. Wife dies first, intestate (all community property passing to her husband)
   (a) Federal estate tax upon her death................$126,500.
   (b) Federal estate tax upon $873,500 at husband's death .... 254,425.

   $380,925.

2. Case II. Wife dies testate, leaving her one-half of community property to children.
   (a) Federal Estate Tax upon her death..................$126,500.
   (b) Federal Estate Tax upon husband's death.... 126,500.

   Total..$253,000.

Total saving if correct method is followed..................$127,925.

A much larger percentage is saved in an estate of $200,000.00

Case I. Total taxes	$36,060.00
Case II. Total taxes	9,600.00
Total saving	$26,460.00

At the same time, the husband should execute a will disposing of *all* of the community property (which he can do with the wife's consent). He should leave to the wife in satisfaction of her community interest a life estate or a life income as to all or an adequate portion of the estate with remainder over to the children. Thus, there would be a single tax of $325,000 upon his death if he dies first, and no tax at all upon the wife's subsequent death.

Finally, if a husband and wife early in their married life will undertake a program of dividing *all* of their marital savings into two equal separate estates the maximum estate tax savings will result. There will be no serious gift tax problems because of the $3,000 per year exemption and the fact that the income on the wife's share can be allowed to accumulate while living expenses can be paid by the husband. Then, of course, each spouse should execute a will disposing finally of his own half of the accumulations. If this is done, the total estate tax on the total accumulations of the spouses will be $253,000 (2x$126,500) in the first case cited above whichever spouse dies first.

This illustrates concretely the one rule which is the basis of all estate planning: *Divide each large estate into as many smaller portions as possible.* In our great democracy, we have learned through the years that "united we stand, divided we fall." This is not true, however, in community property states, at least for tax purposes. If we will always apply the reverse of this rule, namely, "*divided* we stand, united we fall," we will achieve the best possible results from a tax standpoint for our clients.

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